IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. A - 729

RAY FREDRICK EVANS and
RICHARD JOSEPH GARVAS,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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IN THE

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NO. A-729

JAY FREDRICK EVANS and
RICHARD JOSEPH GARVAS,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF
CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioners, JAY FREDRICK EVANS and RICHARD JOSEPH GARVAS, respectfully pray for a Writ of Certiorari to the District Court of Appeal of the State of California to review its judgment affirming their convictions and the imposition of State Prison Sentences.

OPINION BELOW

Hearings on the Motion to Suppress Evidence and the Trial itself were by Court. The California District Court of Appeal affirmed the conviction in a Published Opinion attached as Exhibit "A".

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. Section 1257(3).

QUESTIONS PRESENTED FOR REVIEW

I

CAN THE PROSECUTION ILLEGALLY SEARCH PETITIONER GARVAS' VAN AND ILLEGALLY SEIZE ITS CONTENTS WITHOUT A SEARCH WARRANT, CONSENT OR PROBABLE CAUSE AND INTRODUCE THE FRUITS OF SUCH SEIZURE IN

EVIDENCE AGAINST HE AND HIS CO-DEFENDANT, PASSENGER EVANS?

II

THE MARIJUANA RETRIEVED FROM THE BACK OF THE VAN WAS DISCOVERED THROUGH AN ILLEGAL SEARCH AND SEIZURE IN VIOLATION OF AMENDMENTS IV, V, IX AND XIV OF THE UNITED STATES CONSTITUTION?

III

CAN PETITIONER EVANS BE CONVICTED AND SENTENCED TO STATE PRISON FOR MERELY RIDING AS A PASSENGER IN THE FRONT SEAT OF A VAN CONTAINING MARIJUANA SECRETED IN OPAQUE BAGS AND NOT EVEN SMELLING LIKE MARIJUANA IN THE REAR PORTION OF THE VAN CURTAINED OFF FROM THE DRIVER AND PASSENGER AREA?

CONSTITUTIONAL PROVISIONS INVOLVED

Involved are the 4th, 5th and 14th Amendments to the United States

Constitution.

STATUTES INVOLVED

Involved is California Penal Code § 11532.5 (Possession of Marijuana for sale).

STATEMENT OF THE CASE

Both Petitioners were arrested May 24, 1971. They were subsequently arraigned in Municipal Court and a Preliminary Hearing and a Motion under California Penal Code Section 1538.5 was heard on August 13, 1971, before the Honorable John C. Landis, Municipal Court Judge of the Los Cerritos Judicial District for the County of Los Angeles. The Petitioners were held to answer on the charge of possession of marijuana for sale, a violation of California Health and Safety Code §11530.5. After arraignment in Superior Court on the same charge,a hearing was held anew under California Penal Code §1538.5 before the Honorable Rafael Galceran, Judge of the Superior Court for Los Angeles County. That hearing held on January 17, 1972, resulted in the denial of the motion. A Motion under §995 of the California

Penal Code was denied at the same time.

A Petition for a Writ of Prohibition was filed February 15, 1972, seeking to restrain the trial court from receiving into evidence against the Petitioners in any criminal trial, the evidence which had been sought to have been suppressed through the motion pursuant to California Penal Code §1538.5. The Writ was denied.

The case was submitted on the preliminary transcript and both defendants were declared guilty as charged and both were sentenced to the state prison for the term prescribed by law on July 7, 1972.

Both Petitioners filed timely notices of appeal and on September 5, 1973, their judgments of conviction were affirmed by the District Court of Appeal, though not without doubt as attested to by the 13 page opinion being certified for publication and the multiple doubts being expressed in

the opinion including the declaration on Page 10 thereof, "(i)t is indeed, a rather close question". (D.C.A. Op. P. 10).

The California Supreme Court denied a hearing on October 31, 1973. Due to Counsel's illness an extension within which to file the within Petition was obtained until March 30, 1974. This Petition is now properly before this Court.

STATEMENT OF FACTS

On May 24, 1971, Petitioners, JAY FREDRICK EVANS and RICHARD JOSEPH GARVAS, were stopped by a Deputy Sheriff's unit assigned to Lakewood Station, Patrol Divisio Los Angeles County. The time was 11:50 P.M. Deputy Smith drove the police vehicle; he did not testify. Deputy Varro was the passenger and provided all of the critical testimony for the prosecution. Petitioner Garvas was driving a gold Dodge van with solid panels all the way up to the passenger and driver's doors. The vehicle driven by Garvas was headed southbound on Pioneer, a street without either northbound or southbound traffic at that hour, at a rate of 55 to 60 miles per hour. Deputy Varro testified he estimated the maximum safe speed at 45 miles per hour. He conceded that Garvas' vehicle was not driver errati-

cally (C.T. 27). The Sheriffs activated their red light and the van stopped promptly (C.T. 2-5, 12-16). Deputy Varro, the officer who testified to the apprehension, approached the passenger's side of the van and tapped on the window which was rolled up. Petitioner Evans rolled down the window. Deputy Varro asked Evans, the passenger, for his identification. Evans produced a valid operator's license. At the time Evans produced his license, Deputy Varro noted the strong smell of an alcoholic beverage thought to possibly be wine. Evans was asked whether he had been drinking and stated that he had not. Varro never smelled any odor of alcohol emanating from the breath of either Petitioner. Furthermore, their speech was coherent; they were not intoxicated. (C.T. 2-5, 15-16, 32). Varro then told Evans to alight from the vehicle and go to the sidewalk because he suspected that there

might be an open container of alcoholic beverage in the van. No such container was ever found (C.T. 20). Meanwhile, Garvas was engaged in conversation with Varro's partner, Deputy Smith. Deputy Varro had Petitioner Evans move back a curtain which partitioned the front area of the vehicle (that is the portion utilized by the driver and passenger) from the back portion or bed of the van. Deputy Varro shined his flashlight into the rear of the van and ascertained that nobody else was within. Varro then "walked the defendant Evans to the right rear" and his "partner took Defendant Garvas also back to the right rear, walking on the left side of the van, and they stood on the sidewalk." (C.T. 5-6).

Deputy Varro then returned to the van, entered the right front passenger door and began a search. He scoured the floor of the vehicle with his flashlight and found

nothing. Then he observed a large brown paper sack on the motor console between the driver and passenger. Varro testified that he suspected that the bag might contain a bottle of alcohol. He declined to feel the bag in order to determine whether it likely contained a bottle or can, but rather opened it up and found that it contained money. He pulled out a bundle of bills which appeared to be $800 to $1000 in a new $20.00 bills. He then looked at the next bundle and it was similarly packaged. Varro suspected that there might have been an armed robbery or that the currency might be counterfeit. "It was all new". (C.T. 6-8). He admitted he was uncertain whether the money was counterfeit. Moreover, the deputy had no information concerning any robbery and no weapons were found in the car or on the persons of the Petitioners. The Petitioners were never arrested for robbery (C.T. 21-23, 25-32).

He estimated that there was a total of between $15,000 and $20,000 in the bag. Varro took the bag, showed it to his partner and left the bag and suspects with his partner. Both suspects were asked how much money was in the bag and both indicated they did not know. The actual amount of money in the bag was $21,125.00 (C.T. 8).

Deputy Varro then reentered the vehicle via the front passenger door. He separated some curtains, then climbed across the motor console into the bed or back section of the van. This portion served as a trunk area since the van had no trunk. A jack, jack handle, the spare tire, etc. were located there. As Varro climbed over the console toward the back, he slipped and fell against a bag lying on the floor of the back portion. He used his flashlight to search the interior of that bag and observed numerous square packages resembling kilos of

marijuana. When asked by the Prosecutor whether he had to open the bag to observe the kilos, he responded, "I opened the one end of the bag" (C.T. 9, 16-17, 19, 36-38). He then discussed the packaging of kilos and furnished his opinion that the packages may have contained marijuana (C.T. 9-10). No pictures of the bags containing the kilos or presumably the bag containing the money were ever taken, much less introduced in evidence (C.T. 39).

Deputy Sheriff Winston testified that it was his opinion the marijuana was possessed for sale (C.T. 41). The items thought to be marijuana were stipulated to be such (C.T. 42-43).

Elaborate objections were offered against the admissibility of the marijuana found in the vehicle. The Court made numerous specific findings. In the original edited version of the search and seizure litigation,

these necessary items were edited out. They are included in the eight page Supplemental Transcript.

The defense objected to the admissibility of the contraband, arguing that there was inadequate reason to halt the vehicle; that even if a detention were justified, the techniques employed vis-a-vis the passenger Evans were overreaching, since he was not responsible for any speeding infraction and that the "open container hypothesis" was formed because of that overreaching; that the vehicle code infraction thought to have been committed did not license a search of the back portion of the van; that the search was exploratory and not limited to legitimate purposes and that since the prosecution gave away the money found, which was used as the foundation for the extensive search of the rear of the vehicle, and no photographs were taken, the defense was in no position to

contest whether the money even existed, was of the quantity described, was new, looked counterfeit, etc. (C.T. 47-55).

The Court found that the speed the vehicle was traveling justified stopping the vehicle, that the actions regarding passenger Evans were permissible, that a search of the front part of the van leading up to the discovery of the bag of money was appropriate, but that the search of the rear portion of the car which produced the crucial evidence - the kilos of marijuana - could only be justified by the discovery of the large amount of money suggesting a robbery or burglary. That money was given away by the District Attorney's Office (C.T. 54-55). It was never presented as evidence.

In Superior Court, the 1538.5 Motion was submitted on the transcripts presented below, argued similarly and denied, the Court relying on an unpublished opinion of

the District Court of Appeal. (C.T. 5-15).

REASONS FOR GRANTING THE WRIT AND AMPLIFYING THE SAME

I

THE MARIJUANA RETRIEVED FROM THE BACK OF THE VAN WAS DISCOVERED THROUGH AN ILLEGAL SEARCH AND SEIZURE IN VIOLATION OF AMENDMENTS IV, V, IX AND XIV OF THE UNITED STATES CONSTITUTION

There was no adequate basis for stopping the car in the first place. The mere fact that Mr. Garvas was exceeding the prima facie speed law, was not a crime without demonstrating that the speed was unsafe given the conditions and circumstances. (California Vehicle Code §22350). The officers conceded that there was no traffic either north or southbound on Pioneer Boulevard where Petitioner Garvas was driving. They even con-

ceded that 45 miles per hour was a safe speed and yet a guess that the car was traveling 55 miles per hour was the reason for turning on the red light and stopping the vehicle. Any fruits of an illegal detention must be excluded. People v. Henze, 253 Cal. App. 2d 986, 61 Cal. Rptr. 545 (1967).

Even if the officers had the right to stop the car driven by Petitioner Garvas, and issue him a citation or speak with him concerning a speeding infraction, this purpose did not justify intruding upon the privacy of passenger Evans and forcing him to produce identification and get out of the car, both of which he did. In the absence of the intrusion upon Evans, the record fails to show that the odor of alcohol would have been noticed and subsequent events would have transpired. Thus, if the activities of Deputy Varro amounted to an overreaching

assertion of authority, the fruits of that unjustified assertion must be declared inadmissible. Badillo v. Superior Court, 46 Cal. 2d 269, 294 P.2d 23 (1956); Gascon v. Superior Court, 169 Cal. App. 2d 356, 337 p. 2d 201 (1959); cf. People v. Griffith, 19 Cal. App. 3d 948, 97 Cal. Rptr. 367 (1971); People v. McMillan, 18 Cal. App. 3d 311, 95 Cal. Rptr. 590 (1971); People v. Adam, 1 Cal. App. 3d 486, 81 Cal. Rptr. 738 (1969).

Petitioners also dispute that the smelling of an alcoholic beverage under the circumstances in this case, justifies the extensive search of the rear portion of the van. It is true that if an officer reasonably suspects that a person is driving a car carrying an open container of alcohol in a place readily accessible to the driver or to one of his passengers, that he may search for the open container. (California Vehicle Code §23123). But that principle is true if, and only if, the open container appears to be

in an area where the driver may not store it or transport it. In the present case, this proposition was accepted by the judge who heard the witnesses testimony and ruled on the admissibility of evidence. It was clear to him, and the record corroborates it, that the van in which Petitioners were riding had no trunk. Instead, the rear portion served that office. The section in question itself provides that an open container may be "kept in some other area of the vehicle,not normally occupied by the driver or passengers, if the vehicle is not equipped with a trunk". (California Vehicle Code §23123). To hold that an open container could not be placed there would rule ineligible a vast amount of widely used vehicles as conveyors of bottles with their seals not intact. Not only did a curtain separate the front portion of the car from the rear, but so did a console and a steep divide -- so steep that the officer

conducting the search tripped and fell trying to make his way over the motor console en route to the back of the van. In the back were a jack, jack handle, spare tire--the normal accoutrements for any trunk. Certainly the rear bed of the van served the same purpose as a trunk on a conventional vehicle and an open container is allowable there.

Judge Landis, the Judge who heard the evidence and observed the demeanor of the witnesses, based his ruling legitimizing the search expressly on the finding of the large sum of new money. (C.T. 50-55). 1/ In fact, the Court stated after justifying the stopping of the vehicle and the search premised upon the odor of alcohol - the quest

1/ The Superior Court Judge merely relied upon an unpublished opinion (R.T. 9) which is contrary to the policy underlying the classifying of opinions as unpublished. Certainly, if counsel were supposed to research and cite opinions which this Court has certified for non-publication, those opinions would have to be accessible.

for the open container:

" I would go along with the fact that on that alone there would be no justification for a search of the back part of the vehicle."

Petitioners urge first that the search itself was illegal; secondly, that even if it was not, it revealed no proof of a burglary or robbery or counterfeiting crime; and finally, that since the prosecution had given away the evidence, therefore disallowing any challenge to whether they were in fact new, whether they had a counterfeit lustre, whatever that is, it cannot justify the search based upon the sum of money which the Prosecuting authority has turned over to another agency. (Note: The Prosecution did not merely permit the Internal Revenue Service to place a lien on the monies and take charge of them, but rather relinquished for all time, the monies which constituted

crucial evidence on the question of the legality of the search prior to that question being litigated).

Deputy Varro admitted that rather than feel the bag to see whether it possibly contained a bottle or can, he searched it. (C.T. 35). That was unnecessary since a simple pat down search would have sufficed. It has been clear since People v. Brown, 45 Cal. 2d 640, 290 P.2d 524 (1955), that a police officer could not merely fail to conduct a less intrusive inquiry and then justify his lack of knowledge resulting from that failure as the probable cause to conduct a search which would not have been legitimized if the proper course of action were followed. Recent cases enunciate the proposition that the extent of the invasion by a police officer is limited to the need for such invasion. See e.g., Terry v. United States, 392 U.S. 1, 88 S. Ct. 1868

(1968); Sibron v. United States, 392 U.S. 40, 88 S. Ct. 1889 (1968). In People v. Mickelson, 59 Cal. 2d 448, 30 Cal. Rptr. 18, 380 p. 2d 658 (1963). Justice Traynor condemned a policeman, after a stop on a "hunch" for rummaging through closed baggage found in the car in the hope of connecting the defendant with a recent robbery. And similarly here, an unwarranted intrustion to the paper bag and the satchels must be condemned. The defendants were not placed under arrest for a traffic offense or otherwise. cf. United States v. Robinson, (Oct. Term, 1973, No. 72-936); Gustafson v. Florida, (Oct. Term, 1973, No. 71-1669).

As to the second point, the mere fact that a large amount of money is found in the car,and this engenders the envy of us all, does not provide probable cause to believe that a robbery or burglary has been committed or that the money is counterfeit.

In the instant controversy, there is no proof that any robbery or burglary had been committed in the vicinity or that counterfeit bills matching the description of those which the officers claim to have found were floating in the area. Certainly even after the discovery of the money neither defendant was arrested for any of these charges (C.T. 22). And presumably if there was probable cause to arrest them, they would have been arrested. The search and seizure was illegal.

II

THE PROSECUTION WILFULLY DESTROYED EVIDENCE CRITICAL TO THE RESOLUTION OF THE SEARCH AND SEIZURE CONTROVERSY BY TURNING OVER THE CURRENCY UTILIZED AS THE BASIS OF THE SEARCH TO INTERNAL REVENUE AGENTS SO THAT IT WAS COMMINGLED AND UNAVAILABLE FOR INSPECTION TO EITHER BELIE THE PROSECUTION WITNESSES CLAIM THAT IT APPEARED TO BE COUNTERFEIT AND/OR THE FRUIT OF AN ARMED ROBBERY. NORMALLY, A LIEN AGAINST THE MONIES IS EMPLOYED TO PROTECT THE GOVERNMENTAL INTEREST INVOLVED, IF ANY, AND WOULD CERTAINLY HAVE SUFFICED IN THE INSTANT CASE.

In the preceding argument Petitioners explicated the point that the Judge who

listened to the sole witness called to justify the search and seizure of the van, Deputy Varra, predicated his validation of that search on the characteristics of the currency found in a bag on the console. Although the officer claimed that it appeared counterfeit or the fruit of an "armed" robbery the defense was foreclosed from ascertaining whether the money existed, was crisp and new, seemed counterfeit, etc. because the prosecution effectively destroyed the evidence by turning it over to the Internal Revenue Service (C.T. 44). By virtue of that unilateral deed (no pictures were even taken of the currency) and the subsequent commingling the evidence was effectively destroyed. It is mere semantic offuscation to claim that since the evidence was not physically destroyed it was available.

It is axiomatic that the prosecution is

is not entitled to either wilfully or negligently destroy evidence. Brady v. Maryland, 373 U.S. 83, 89 (1963); Giles v. Maryland, 386 U.S. 66, 87 S. Ct. 793 (1967); United States v. Wilkins, (2d Cir. 1963) 326 F.2d 135, 137; Barbee v. Warden (4th Cir. 1964) 331 F.2d 53; United States v. Poole (7th Cir. 1967) 379 F.2d 645; Orr v. United States (D.C. Cir. 1967) 386 F.2d 988; Hamric v. Gailey, (4th Cir. 1967) 386 F.2d 391; Jackson v. Wainwright (5th Cir. 1968) 390 F.2d 288; Lorraine v. United States, (9th Cir. 1968) 396 F.2d 339; United States v. Keogh (2d Cir. 1967) 391 F.2d 147; Lee v. United States (9th Cir. 1968) 388 F.2d 738; United States v. Roberts (2d Cir. 1968) 388 F.2d 646. Although most of those cases have arisen in the context of guilt or innocence, the same principles should adhere to any phase of the investigation.* Elsewise, this

* It certainly pertains to maintaining the accessibility of informants. See e.g., Eleaze v. Superior Court, 1 Cal. 3d 1847, 83 Cal. Rptr. 586 (1970)

Court consels behavior inconsistent with retaining the evidence which is utilized to justify searches and arrests. Petitioners are hopeful that no such rule is forthcoming.

The District Court of Appeal in reality decides this controversy by assuming that the defense while requesting the right to examine the monies confiscated to see if, in fact, their nature and characteristics showed (1) th that they existed; (2) appeared to be counterfeit or; (3) appeared to be the fruits of the robbery, didn't frame their objection in terms of the "best evidence rule" but were content to demand the best evidence in order to ascertain if it warranted the conclusions of the witness. Counsel strenously urges that a rule which might in some instances be invoked to maintain the secrecy of confidential informants not be utilized to allow the Internal Revenue Service to confiscate - rather than place a lien on - the evidence which the prosecution seeks to use as its

justification for the initial search. Certainly, the defendants' threatened no harm to the money kept as property by the booking police agency and in no fashion threatened its use to future law enforcement. A simple lien would have sufficed to protect Internal Revenue Service claims (not necessarily valid) to the money and the only position of the Prosecution was one of conceding that they would and could not supply the money since the police had turned it over to the Internal Revenue Service. Simply put, the Prosecution should not be encouraged to destroy evidence and then rely on the far-fetched significance of such alleged evidence to arrest and convict those persons accused of crime. No argument in favor of the Prosecution has been or can be advanced in support of this noxious thesis which seeks to become our law although it runs athwart all prior relevant decisions on

the subject and stands as a published legal decision in our legal journals.

III

THE STATE'S CASE AGAINST THE PASSENGER EVANS WHICH WAS CHARACTERIZED BY THE CALIFORNIA APPELLATE COURT AS "(I)NDEED A RATHER CLOSE QUESTION" WAS FOUNDED ON A COMPLETE DEARTH OF EVIDENCE OF INVOLVEMENT WITH THE CONTRABAND AND NO EVIDENCE THAT EVANS WOULD RECOGNIZE MARIJUANA IF HE SAW IT.

It has been firmly established that to support a conviction involving possession of narcotics, certain elements are essential: (1) dominion and control over the contraband, (2) knowledge of its presence, and (3) knowledge of its narcotic character. People v. Redrick, 55 Cal. 2d 282, 359 P.2d 255. Redrick also made clear "that proof of opportunity of access to a place where narcotics are found, without more, will not support a finding of unlawful possession".

See also People v. De la Torre, 268 Cal. App. 2d 122, 73 Cal. Rptr. 704 (1968) and People v. Haynes, 253 Cal. App. 2d 1060, 61 Cal. Rptr. 859 (1967).

Nowhere does the record indicate that Petitioner Evans had any sort of knowledge, let alone dominion and control over the marijuana seized during the search of the van.

To re-emphasize the factual setting: Evans was a passenger in the vehicle. There was a curtain separting the place where the driver and passenger sat from the rear of van. It was dark (11:55 p.m.). The rear of the van was not lighted. The contraband was in the rear of the van in two satchels, one of which was closed, the other of which may have been open only slightly.

People v. Solo, 8 Cal. App. 3d 201, 86 Cal. Rptr. 829 (1970) allowed imputation of possession of the contraband immediately and

at least jointly accessible to the defendant and subject to the defendant's dominion and control. But the question of possession is more difficult to resolve than the generalities indicate. Circumstances play a large part in drawing the inference of possession. In Solo, for example, there were four (4) males riding in a Volkswagon "bug". When followed by a policeman, a laundry bag stuffed with 18 kilos of marijuana was thrown out of the car. The court in that case said it was plausible to assume that in those cramped quarters, even the defendant riding in the back seat would have knowledge of the laundry bag of marijuana. Here, appellant Evans was one of two persons riding in a large, roomy Dodge Van. Further, there was a curtain dividing where Evans was riding from the rear of the van. Certainly, this is distinguishable from the cramped quarters of four males in a VW.

There can be no assumption that Evans must have been aware of the contraband. And even if by some chance he was aware that there were some satchels in the rear of the van, this is no reason to assume that in this darkness of the van he could see through the satchels and see the wrapped packages inside. And even if he had seen through the satchels, how would he know that wrapped inside the packages was marijuana. He was never qualified as an expert on the subject and the marijuana didn't even smell like marijuana.

The People have never contended that there was any proof that Evans physically touched either the satchels or the marijuana. In People v. Mijores, 6 Cal. 3d 415, 99 Cal. Rptr. 139, 491 P.2d 1115 (1971), a defendant who took a bundle of heroin and associated paraphernalia from a friend and threw it away, was ruled not to have "possessed" the

heroin and his conviction was reversed. How infinitely less brief did Evans "possess" the marijuana. In fact, he possessed it not at all! He had no dominion or control over the marijuana; the van and its contents belonged not to him, but to the driver. And Evans had no knowledge what was in the rear of the van, and certainly there can be no inference that Evans had knowledge of the narcotic nature of what was inside the satch

Absent the element of possession, Evans conviction for possession for sale (or any other type of possession) cannot stand.

In the published opinion of the District Court of Appeals it was conceded that this issue was "indeed, a rather close question". (D.C.A. Op. p. 10). The District Court of Appeals whimsically distinguished away this Court's opinion in People v. Williams, 5 Cal. 3d 211 wherein a 1000 benzedrine tablets were found under the

driver's seat in the front portion of the car and one such benzedrine near the foot of the passenger himself. Nevertheless, the conviction was reversed because there was nothing in the record to support the inference beyond a reasonable doubt that the passenger knew of the benzedrine and that it was a dangerous drug; that despite the fact that the defendant had, when initially observed, made "a motion to the center of the seat". In this case, the totality of the contraband was discovered in the rear unlighted section of a van (after a tedious adventurous and stumbling search) in which Evans was a mere passenger and the only "furtive gesture" by the passenger was one which would coincide with the reaction of most of us when we learn of an approaching police car. The fact that two searches by a seasoned police officer actually involving the stumbling over of contraband and flashlight inspection of the

rear portion of the van and expertise in narcotics were necessary to justify the search manifestly disallow the affirmance as to Evans in this case.

It is immensely difficult to follow the logic of the District Court of Appeal that while a "furtive gesture" would constitute insufficient probable cause for an officer to search the vehicle People v. Superior Court (Kiefer), 3 Cal. 3d 807, it nevertheless was sufficient to sustain the conviction of the defendant beyond all reasonable doubt.

Petitioners urge that this published opinion is inconsistent with not only Williams & Kiefer, supra, and their progeny but notably People v. Mickelson, 59 Cal. 2d 448, People v. Henze, 253 Cal. App. 2d 986, People v. Cassel, 23 Cal. App. 3d 775, and virtually throws the law of knowing constructive dominion and control into chaos but

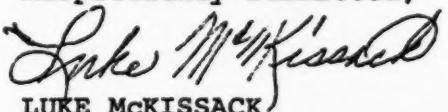
relegates to trial courts everywhere the power, the discretion to ignore crucial and meaningful decisions by the Court for over a decade.

This defect is a serious violation of the Federal Constitution in that no conviction may be upheld without violating due process absent evidence to sustain it. Thompson v. Louisville, 362 U.S. 199, 80 S. Ct. 624 (1960); Garner v. Louisiana, 386 U.S. 157, 82 S. Ct. 248 (1961).

CONCLUSION

For the aforegoing reasons the within Petition for Writ of Certiorari should be granted.

Respectfully submitted,



LUKE McKISSACK
Attorney for Petitioners

APPENDIX

Certified for Publication.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
vs.
JAY FREDRICK EVANS, and RICHARD JOSEPH GARVAS,
Defendants and Appellants.

2nd Criminal No. 22254
S.Ct.No. A423 828

COURT OF APPEAL-SECOND DIST.
FILED
SEP 5 - 1973
CLAY ROBBINS, ... Clerk
Deputy Clerk

APPEAL from a judgment of the Superior Court of Los Angeles County. Julius A. Leetham, Judge. Affirmed.

Luke McKissack, for Defendants and Appellants.

Evelle J. Younger, Attorney General; Edward A. Hinz, Jr., Chief Assistant Attorney General, Appeals Section; William E. James, Assistant Attorney General, Appeals Section; Norman H. Sokolow, Deputy Attorney General; Ellen Birnbaum Kehr, Deputy Attorney General, for Plaintiff and Respondent.

Defendants appeal from a conviction of possession of marijuana for sale. (Health & Saf. Code,

§ 11530.5.)

FACTS

Shortly before midnight on May 24, 1971, Sheriff Deputies Varro and Smith saw a van traveling at about 55 to 60 miles an hour in a zone with a posted speed limit of 35 miles per hour. They stopped the van. It appeared that Garvas was the driver and Evans the only passenger. Deputy Smith approached Garvas, while Varro went to the passenger side. As he approached Evans, he saw him faced "toward the rear . . . and moving about." Evans' back was turned toward him. Varro tapped on the rolled-up window on the passenger side. Evans rolled it down. Varro asked him for identification. At that time he noticed an "extremely strong smell of alcoholic beverage." It smelled like wine. There was no alcohol on his breath. Varro believed the smell of alcohol was too strong to be coming from one or two persons.[1/] He asked Evans to step out of the vehicle. He suspected that there was an open container of an alcoholic beverage in the van. (Veh. Code, § 23123.) Apparently at about the same time as Varro asked Evans to step out of the

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1/ At another point Smith described the odor as "overpowering."

vehicle, he also requested him to pull back a curtain which separated the area of the two front seats from the back of the van. Evans complied. Using a flashlight Varro determined that no other person was in the back. From where he was standing, Varro could not see whether there was an open container in the front part of the vehicle. Both Evans and Garvas then stepped out of the van and were taken to the rear where they remained with Deputy Smith for the time being. Varro then reentered the van to look for the open container which he suspected to be inside. He noticed a large brown paper sack on the console between the seats. Thinking that it might contain a bottle he opened it. Instead of a bottle, he saw a large quantity of money which appeared to consist of many twenty dollar bills.[2/] At that point his thoughts shifted from open containers to armed robbery and counterfeiting. He took the bag to Deputy Smith and informed him of his suspicions. Garvas and Evans were asked how much money was in the bag. Both said that they had no idea.

2/ It was eventually determined that the exact amount of cash in the bag was $21,125.00.

Varro reentered the van. As he climbed across the console to the back he noticed several canvas bags scattered about on the floor. He slipped on one of them and fell against another which was partially open. With his flashlight he "peered into the opening, into the bag, and observed numerous square packages resembling kilos of marijuana."[3/] The marijuana was soaked in wine. Eventually it developed that the several canvas bags in the back of the van contained "50 compressed bricks of plant material, 35,026 grams total weight marijuana."

CONTENTIONS

On appeal defendants contend: 1. the marijuana was illegally seized; and 2. the People failed to

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3/ While the record is by no means one hundred percent clear on the point, it clearly supports the inference that the bag in question was open when Varro first saw it. His first description of the bag was precisely to that effect. Matters became confused when, in answer to the question "did you have to open the bag to observe the kilos," he answered, "I opened one end of the bag." A little later, when he was asked whether any "part of the contents of the bag itself was exposed," he answered, "no." Later still, during cross-examination, he testified that he slipped and landed "on a partially filled bag in [sic] which time he looked in the bag and the end was opened." He also testified: "The bag on the floor was already opened from which I viewed the one brick and upon opening it far enough I shined my flashlight in and seen the rest of them. . . ."

establish that Evans was in knowing possession of contraband.

1. The Seizure: Defendants attack every single step which led to the discovery of the contraband. None of their contentions has merit.

They first impugn the stopping of the van, pointing to the fact that it was not being driven erratically and that there was no other traffic on the road.

The speed of the van exceeded the posted limit by 20 to 25 miles per hour. (Veh. Code, § 22362.) While there was no moving traffic at the time, there were vehicles parked along the side of the street and there were two bars in the area. Certainly the officers had "reasonable cause to believe" that a public offense had been committed in their presence. (Pen. Code, § 836.)

Defendants claim that Varro had no right to order Evans to leave the vehicle. In the circumstances, Varro was entitled to ask Evans to roll down the window to talk to him. (People v. Superior Court (Kiefer), 3 Cal.3d 807, 830.) At this point, when Varro smelled an overpowering odor of alcohol that could not have been

coming from one or two people, he was entitled to investigate further. It was not unreasonable to order Evans out of the car. (People v. Figueroa, 268 Cal. App.2d 721, 726-727.) We cannot say that the request violated any substantial right of Evans.

The discovery of the large amount of cash in the brown paper bag is attacked on the ground that it was not necessary for Varro to open the bag in order to ascertain whether it contained an open beverage container. In making this argument defendants equate brown paper bags with people, claiming, in effect, that in searching for a container Varro was bound to use the least intrusive means of accomplishing his purpose. Thus, they argue he could have determined that the bag contained neither a bottle or can by squeezing it. (Cf. Terry v. Ohio, 392 U.S. 1, 25-26; People v. Mickelson, 59 Cal.2d 448, 452-454.)

We know of no rule of law to the effect that although the police are entitled to search, they must disprove, with respect to every stage of the search, that their objective could have been attained by less intrusive methods. There is no suggestion in this case that Varro peeked rather than pinched because he was not

eally looking for a bottle or a can. He simply mployed one reasonable means of ascertaining what was nside the bag instead of another. That he was entitled to look for a container, admits of no doubt. hether or not a suspicion that such a container was n the rear of the van - which had no trunk - would ave pointed to a violation of section 23123 of the ehicle Code is not terribly important. The brown aper bag was within easy reach of the driver.

Once the unusual amount of cash, genuine or contraband,[4/] was found, the focus of the search shifted. The officers reasonably suspected that the money was the fruit of a robbery or counterfeit and searched for further contraband or evidence. In view of the mobility of the vehicle they were entitled to do so. (Brinegar v. United States, 338 U.S. 160, 164; Carroll v. United States, 267 U.S. 132, 153-154.) The right to search did not depend on the right to arrest. (Carroll v. United States, supra, 267 U.S. at p. 156.) In the

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4/ Deputy Varro, the only witness, professed an inability to determine the genuineness of the cash. This, of course, in no way destroyed the obvious inferences which the deputy could draw from the large amount and defendants' improbable denials.

course of the clearly permissible search, Varro then literally stumbled onto contraband. (Cf. People v. Superior Court (Kiefer), supra, 3 Cal.3d 807, 816-817.)

Defendants raise an additional issue which is surely sui generis: that "the prosecution gave away the evidence which the Court relied upon to justify the search of the rear portion of the van where the contraband was found." They refer to the money, genuine or counterfeit, which was found in the paper bag.

We leave aside the question whether the discovery of the money was essential to justify searching that portion of the van within reach of the driver. We also assume, but do not decide, that a perversely technical application of the best evidence rule (Evid. Code, §§ 1500) would - on proper and timely objection - preclude the receipt of secondary evidence concerning "the contents" of the pieces of paper found in the bag. We find simply that the way the problem arose below precludes its consideration here.

At defendants' preliminary hearing Varro's evidence concerning his discovery of the money, his questioning of defendants with respect thereto and his suspicions as to its significance was received without

objection. After a motion to dismiss had been extensively argued and denied, counsel for Garvas requested that the money "be sequestered by the District Attorney and the bills kept available." The prosecutor announced that the money had been turned over to the "Federal Government." The magistrate suggested that defense counsel should take steps to obtain the evidence. Counsel, however, had a better idea: he moved - belatedly and, of course, unsuccessfully - to strike all testimony "with reference to the $21,000 themselves on the ground that the dollar bills would be the best evidence." The court then repeated its ruling denying the motion to dismiss.

In the superior court motions under section 995 and 1538.5 of the Penal Code were argued and submitted, one right after the other, on the transcript of the preliminary hearing. During the argument on the 995 motion counsel did deplore the People's failure to preserve the money and permit the United States - apparently it was the Internal Revenue Service - to "confiscate" the evidence. He did not, however, argue the matter from the point of view that secondary evidence had been erroneously received. The 995 motion was denied. There

was no further argument on the point in connection with the 1538.5 motion. The matter was then submitted for decision on the same, by now presumably well-thumbed, transcript. No further demand on the People to produce the money was made.

Any objection based on the best evidence rule was waived by failure to assert it at the proper time. The point that the People suppressed evidence relevant to a proper consideration of the motion to suppress simply was not pursued. The 1538.5 motion did not have to be submitted on the transcript of the preliminary hearing. If counsel had been sincere in his[5/] desire to see the money in court, he should have moved to that effect and the obviously tricky problem of how to pry it out of the Internal Revenue Service could have been explored.

The seizure was legal.

2. Sufficiency of the Evidence. As noted, the issue of sufficiency of the evidence to convict is only raised on behalf of Evans, the passenger. It is, indeed, a rather close question. Obviously the case

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5/ While we speak of counsel in the singular, the fact is that defendants had separate representation at all stages below. From time to time, however, it seemed to be accepted that objections, motions and statements by one counsel were made on behalf of both.

which must be distinguished, if we are to affirm, is People v. Williams, 5 Cal. 3d 211. There a benzedrine tablet had been found near the foot of the front seat passenger of a parked car. About 1000 more tablets were later found under the driver's seat. The driver was absent. Reversing the passenger's conviction, the Court held that while there was sufficient circumstantial evidence that the defendant had constructive possession of the single tablet, nothing in the record justified an inference that he knew that it was a restricted dangerous drug. The court considered as too ambiguous evidence that when first observed, the defendant had made "a motion to the center of the seat." It referred to People v. Superior Court (Kiefer), supra, 3 Cal.3d 807, 818-819, where it had discussed the significance of "furtive gestures" as they relate to probable cause to search and arrest. (5 Cal.3d at p. 216.)

We cannot read Williams to mean that the significance of furtive gestures in the probable cause context necessarily remains zero when the issue changes from probable cause to guilt. Then the meaning of a defendant's movements can be evaluated in the light of all other facts which a later, legal search has brought to

light. Even Kiefer recognizes that a "furtive gesture coupled with prior reliable information may constitute probable cause." (Id., at p. 819.) If reliable information can turn innocuous movements into indicia of guilt, surely there must be cases where the demonstrated presence of contraband can do the job.

In Williams the facts were such that even the later physical discovery of the contraband imparted no guilty significance to the defendant's vaguely described "motion to the center of the seat." It had no reasonable relationship to the contraband. Here the facts are quite different: at least one of the bags containing marijuana - the one over which Varro stumbled - was found immediately behind the two front seats, which were separated from the interior of the van by an easily lifted curtain. Clearly the trial court was free to infer that Evans' conduct when Varro approached the car was prompted by understandable concern that the rather bulky contraband to the rear of the two occupants would arouse police curiosity.[6/] The evidence was sufficient.

6/ In discussing the issue of the sufficiency of the evidence we have deliberately refrained from mentioning the possible significance of the other, quite unusual,

Continued.

Affirmed.

CERTIFIED FOR PUBLICATION.

KAUS, P.J.

We concur:

STEPHENS, J.

ASHBY, J.

6/ Continued. features of this case: the large amount of money and the odor which met the officers. While these two factors - particularly, of course, the money - point to criminal conduct of some kind, we find it both difficult and unnecessary to assess their significance on the issue of knowledge of the narcotic nature of the marijuana.

EXHIBIT "A"

Copy of District Court of Appeal Opinion

EXHIBIT "B"

CALIFORNIA PENAL CODE - § 995. Cases in which indictment or information must be set aside.

The indictment or information must be set aside by the court in which the defendant is arraigned, upon his motion, in either of the following cases:

If it be an indictment:

1. Where it is not found, endorsed, and presented as prescribed in this code.

2. That the defendant has been indicted without reasonable or probable cause.

If it be an information:

1. That before the filing thereof the defendant had not been legally committed by a magistrate.

2. That the defendant had been committed without reasonable or probable cause.

EXHIBIT "C"

CALIFORNIA PENAL CODE - § 1538.5. Motion to return property or suppress evidence.

(a) Grounds. A defendant may move for the return of property or to suppress as evidence any tangible or intangible thing obtained as a result of a

search or seizure on the ground that:

(1) The search or seizure without a warrant was unreasonable; or

(2) The search or seizure with a warrant is insufficient on its face (ii) the property or evidence obtained is not that described in the warrant; (iii) there was not probable cause for the issuance of the warrant; (iv) the method of execution of the warrant violated federal or state constitutional standards; or (v) there was any oth violation of federal or state constitutional standards.

... ...

EXHIBIT "D"

CALIFORNIA VEHICLE CODE - §22350. Basic speed law.

No person shall drive a vehicle upon a highway at a speed greater than is reasonabl or prudent having due regard for weather, visibility, the traffic on, and the surface and width of, the highway, and in no event at a speed which endangers the safety of persons or property.

EXHIBIT "E"

CALIFORNIA VEHICLE CODE - § 23122. Possessi of opened container.

No person shall have in his possession on his person, while in a motor vehicle upon a highway, any bottle, can, or other

receptacle, containing any alcoholic beverage which has been opened, or a seal broken, or the contents of which have been partially removed.

EXHIBIT "F"

CALIFORNIA HEALTH & SAFETY CODE - §11530.5. Possession of marijuana for sale; punishment; prior convictions.

Every person who possesses for sale any marijuana except as otherwise provided by law shall be punished by imprisonment in the state prison for not less than two years nor more than 10 years, and shall not be eligible for release upon completion of sentence, or on parole, or any other basis until he has served not less than two years in prison.

If such a person has been previously once convicted of any felony offense described in this division or has been previously once convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous conviction shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or is admitted by the defendant, he shall be imprisoned in the state prison for not less than five years nor more than fifteen years, and shall not be eligible for release upon completion of sentence, or parole, or any other basis until he has served not less than three years in prison.

If such a person has been previously two or more times convicted of any felony offense described in this division or has been previously two or more times convicted of any offense under the laws of any other state or of the United States which if committed in this State would have been punishable as a felony offense described in this division, the previous convictions shall be charged in the indictment or information and if found to be true by the jury, upon a jury trial, or if found to be true by the court, upon a court trial, or are admitted by the defendant, he shall be imprisoned in the state prison from 10 years to life, and shall not be eligible for release upon completion of sentence,or on parole, or on any other basis until he has served not less than six years in prison.

CLERK'S OFFICE, SUPREME COURT
4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

OCT 31 1973

I have this day filed Order

HEARING DENIED

In re: 2 Crim. *No.* 22254

People

vs.

Evans

Respectfully,

G. E. BISHEL
Clerk

11121-577 9-73 3M OSP